In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 762

CHARLES F. DALLY AND SARAFRANCIS DALLY,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 71–82) are reported at 20 T. C. 894. The opinion of the Court of Appeals (R. 109–113) is reported at 227 F. 2d 724.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1955. (R. 114.) A petition for rehearing was denied on December 22, 1955. (R. 115.) The petition for a writ of certiorari was filed on March 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether under Sections 41 and 42 of the Internal Revenue Code of 1939 the courts below properly determined the amount of profit realized by taxpayer[1] on the partial completion of a construction contract in 1942.

STATUTE INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 are:

> SEC. 41. GENERAL RULE.
>
> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *
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> (26 U. S. C. 1952 ed., Sec. 41.)

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[1] Charles F. Dally will be referred to as the taxpayer. Mrs. Dally is interested only because the income here considered was community income under Washington law. (R. 73, 109.)

SEC. 42 [as amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687]. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

(26 U. S. C. 1952 ed., Sec. 42.)

STATEMENT

In May, 1942, taxpayer entered into a contract with Federal Public Housing Authority for the manufacture and delivery of 1,000 prefabricated housing units. The first deliveries were made in October, 1942, and the contract was completed in February or March, 1943. (R. 73.)

Article 8 of the contract provided as follows (R. 73–74):

> Payments.—The contractor shall be paid, upon the submission of properly certified invoices or vouchers semi-monthly, ninety per cent (90%) of the prices stipulated herein for articles delivered and accepted or services rendered, less deductions, if any, as herein provided. The remaining ten percent (10%) of the prices stipulated herein shall not be paid until all of the construction and erection work

of all the dwelling units has been finished and finally accepted by the contracting officer.

Payments under the contract were made on the basis of periodical estimates for partial payment. These estimates were prepared on government forms, with provision for certification by the taxpayer and also on behalf of the United States by the area project manager. No attempt was made by either party to check the exact number of units delivered before certifying the estimates. (R. 74.)

There were eight such estimates, six of which were for periods ending in 1942, and the other two for periods ending in 1943. Payments made on the basis of the first six estimates amounted to $1,621,666.06 in the aggregate, and the payments for the remaining two aggregated $248,585.18, making a grand total of $1,870,251.24. (R. 75.)

In accordance with the contract, ten per cent of the amount of each estimate was retained by the Government pending completion of the contract in a manner satisfactory to the contracting officer. Payment on account of the last estimate (No. 8) was made in February or March 1943, and final payment of the retained ten per cent was made to taxpayer in June, 1943. (R. 75.)

The taxpayer derived a profit of $832,202.33 from the contract. (R. 76.)

Taxpayer and Mrs. Dally, who filed their returns on an accrual basis (R. 73), reported gross receipts from the contract of $1,459,499.45, being $1,621,666.06 less the ten per cent retained, in their original income tax returns for 1942; and in their original returns for 1943 they reported gross receipts of $410,751.79, which included the ten per cent retained amount from the houses delivered in 1942. Costs were allocated proportionately. (R. 75–76.)

Thereafter, amended returns were filed by taxpayer and Mrs. Dally for 1942 and 1943, based upon a check by taxpayer's brother which purported to show actual deliveries differing from the estimates. This resulted in allocating a greater proportion of the profit to 1943 and a lesser proportion to 1942 than shown in the original returns prepared on the basis of the estimates, as above indicated. (R. 76–77.)

The Commissioner refused to accept the allocation in the amended returns and determined deficiencies based upon the original allocation, but without any deduction for the retained percentage in 1942. He thus determined that of the total contract price of $1,870,251.24, the amount attributable to 1942 was $1,621,666.06 without deduction of the retained ten per cent. This resulted in taxing in 1942 $714,846.52 of the total profit of $832,202.33. (R. 18, 20, 78–79, 81.)

The Tax Court held (1) in favor of the Com-

missioner that the allocation of profit between 1942 and 1943 should be based upon the periodical estimates and not upon a subsequent check as to actual deliveries; and (2) in favor of the taxpayer that the retained ten per cent should not be accrued in 1942. Accordingly, the Tax Court held that taxpayer should have accrued, in 1942, $1,621,666.06 less ten per cent. (R. 81–82.)

The Commissioner took no appeal and he acquiesced in the Tax Court's decision. 1954–1 Cum. Bull. 4.

The taxpayer appealed to the Court of Appeals for the Ninth Circuit, but shifted his ground so as to abandon his contention before the Tax Court and raise a new point, namely, that estimate No. 6 was not certified until January 6, 1943, and therefore the amount covered by it ($136,528.34) should not be accrued in 1942 but should be attributed to 1943. (R. 95–105, 111.)

The Court of Appeals, affirming the Tax Court, held that even if taxpayer could raise this new point for the first time on appeal, a question which it did not determine, the argument was fallacious on the merits. (R. 112–113.)

ARGUMENT

The taxpayer urges here, as he did in the Court of Appeals (but not in the Tax Court), that 90 per cent of the amount of Periodical Estimate No. 6 should be accrued as income in 1943 and

not in 1942 because, although it related to deliveries made on or before December 31, 1942, he (taxpayer) did not certify it until January 6, 1943.[2] The argument rests on the premise that certification was a condition precedent to taxpayer's right to receive payment, so that the amount of the estimate could not properly be accrued as income until 1943. Assuming *arguendo* that this narrow and belated contention could properly be raised in the Court of Appeals, it was correctly decided there and merits no further review.

The Court of Appeals rejected the taxpayer's argument (Pet. 11–14) on the authority of *Continental Tie & L. Co.* v. *United States*, 286 U. S. 290, 295, which holds that income may not be deferred after the right to it matures, even though the ministerial act of computing the amount occurs in a subsequent year. This disposition of the case is clearly correct and accords not only with the *Continental Tie* case, but with other decisions of this Court, such as *Spring City Co.* v. *Commissioner*, 292 U. S. 182; *United States* v. *Anderson*, 269 U.S. 422; *American National Co.* v. *United States*, 274 U. S. 99; and *Brown* v. *Helvering*, 291 U.S. 193.

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[2] The evidence clearly indicates that Estimate No. 6 was made and dated December 31, 1942. (R. 63–64). The copy of the estimate in the record (R. 32–34) shows certification by Dally on January 6, 1943; but there are no signatures on the forms for certification by auditor and project manager.

In the instant case the act of certification was purely ministerial, as held by the Court of Appeals (Pet. 13), so that the situation is entirely different from one where an engineer's or architect's certificate as to satisfactory completion of the work would be considered a condition precedent to the ripening of the right to receive payment. *Sweeney* v. *United States,* 109 U. S. 618. Here the work was performed in 1942 and the income was then earned by the taxpayer, who was entitled to be paid on the basis of estimates. Hence his right to receive payment was fixed for purposes of taxation at the close of 1942 even though the amount remained to be estimated and certified. The situation is basically similar to one where goods are sold with the understanding that payment is to be made only upon the receipt of a bill. Contingencies of this character, relating to time of payment or determination of the precise amount payable, rather than to the existence of the obligation, do not defer the time for accrual. *American National Co.* v. *United States, supra.*

The taxpayer is mistaken in urging (Pet. 6–8) a conflict with *United States* v. *Harmon,* 205 F. 2d 919 (C. A. 10th). The issue there related to a retained percentage under a government contract, where, as here, final acceptance by the Government was a condition to payment of the retained sum, and acceptance and payment occurred in the year following completion of the work. Like

the taxpayer in *Harmon*, the taxpayer here has prevailed on the retained percentage issue, which is no longer in the case (*supra*, pp. 5–6). On the wholly different problem of progress payments, not even considered in *Harmon*, the claim of conflict is plainly baseless.

Similarly unavailing is taxpayer's effort (Pet. 6, 8) to show a departure by the Court of Appeals from the principles of *Spring City Co.* v. *Commissioner*, 292 U. S. 182, and *Lucas* v. *North Texas Lumber Co.*, 281 U. S. 11. As we have noted (*supra*, p. 7), the decision below plainly applies those principles in holding "that income may not be deferred after the right matures" (Pet. 13) .

We submit, in short, that petitioner's argument on its merits presents no basis for certiorari. It bears emphasis, however, that the taxpayer's tardiness in raising the point is an additional reason for denying the writ. The claim now urged was never presented to the Tax Court and was first advanced in the Court of Appeals. There is no suggestion of any unusual circumstances warranting deviation from the familiar rule that a point not raised or considered in the trial court cannot properly be urged as ground for reversal on appeal. *General Utilities Co.* v. *Helvering*, 296 U. S. 200; *Helvering* v. *Salvage*, 297 U. S. 106; *Helvering* v. *Wood*, 309 U. S. 344; *Hormel* v. *Helvering*, 312 U. S. 552; *Oscanyan* v. *Arms Co.*, 103 U. S. 261.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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